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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1968

No. 370

ELLIOTT GOLDEN, as Acting District Attorney of the County of Kings,

Appellant,

—v.—

SANFORD ZWICKLER,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

FILED AUGUST 2, 1968

PROBABLE JURISDICTION NOTED OCTOBER 14, 1968

INDEX

Docket Entries.

Date	Filings—Proceedings
4-22-66	Complaint Filed. Summons Issued.
4-22-66	Motion for temporary injunction and convening of three-judge court. (returnable May 18, 1966)
4-26-66	Summons returned and filed. Defendant served on 4/22/66.
5- 3-66	Amended Complaint Filed.
5- 3-66	Notice of motion for temporary injunction and convening of three Judge Court etc. (ret May 18, 1966)
5- 4-66	Notice of motion filed for an order dismissing the amended complaint herein pursuant to Rule 12b (1)(6) of the Federal Rules of Civil Procedure on the grounds that (a) this Court lacks jurisdiction of the subject matter of said amended complaint, etc. (returnable May 18, 1966)
5-18-66	Before Rosling, J.—Hearing on motion granting a preliminary injunction in favor of Pltff—Motion argued—Decision reserved.
5-18-66	Before Rosling, J.—Hearing on motion dismissing the amended complaint pursuant to Rule 12b (1)(6)—Motion argued—Decision reserved.
5-20-66	By Rosling, J.—Decision rendered on Pltff's motion for three judge court is granted, motion insofar as it seeks temporary injunction and deft's cross motion to dismiss will be referred to such court for hearing etc. Settle order on notice (See opinion)
5-25-66	By Lumbard, Ch. J. Court of Appeals.—Order filed designating Hon. Joseph C. Zavatt, Ch. J.—D. C., Hon George Rosling, D. C. Hon Irving R.

Docket Entries.

DATE	FILINGS—PROCEEDINGS
	Kaufman, C. J. as three judge Court in above action.
5-25-66	By ROSLING, J.—Order (signed 5/24/66) filed, that a three-judge court consisting of Circuit Court Judge Irving R. Kaufman, Chief Judge, D. C. Joseph C. Zavatt and D. C. Judge George Rosling will convene for hearing on 6/9/66 etc. All additional papers and briefs, i.e. other than those already submitted, shall be filed in guadruplicate with the Clerk, not later than 6/6/66. (P/C mailed)
5-31-66	By ROSLING, J.—Order filed that motion of Pltff for an order to convene a three-judge court is granted and the motion of the Pltff for a temporary injunction and the motion of deft for dismissal of the amended complaint are hereby referred to said three-judge court for hearing and determining said cause. (P/C mailed to attys)
6- 9-66	Before KAUFMAN, C. J., ZAVATT, CH. J., ROSLING, J., Hearing on motion of Pltff for a temporary injunction and the motion of deft for dismissal of the amended complaint etc. Hearing held and concluded—Decision reserved.
9-19-66	By KAUFMAN C. J.—ZAVATT CH. J. & ROSLING, J.—Decision rendered on motion by Pltff for preliminary injunction and deft's motion to dismiss—Concurring opinions by Kaufman C. J. and Zavatt, Ch. J., denying Pltff's motion for preliminary injunction and granting deft's motion to dismiss (Settle order on or before 10 days from date) By ROSLING, dissenting opinion (See opinion filed)

Docket Entries.

Date	Filings—Proceedings
9-29-66	By Kaufman, C. J., Zavatt, Ch. J.—Order filed that the motion of Pltff for a preliminary injunction is Denied and that the motion of deft to dismiss complaint is granted. (P/C mailed to attys)
10-12-66	By Kaufman, C. J.,—Revised concurring opinion filed.
10-14-66	By Rosling, J.—Revised dissenting opinion filed.
10-28-66	Notice of Appeal Filed. (affid of service by mail of a copy of appeal, to Louis J. Lefkowitz, Atty General, 80 Centre St, N. Y. annexed to appeal)
11-22-66	Transcript of June 9, 1966—hearing filed.
2-17-67	Certified copy of Order of Supreme Court filed, probable jurisdiction noted and the case is placed on the summary calendar.
12- 8-67	Opinion of Supreme Court filed.
1- 4-68	Certified copy of order Supreme Court that the judgment of said court is reversed with costs; and that this cause is, remanded to U.S.D.C. for E.D.N.Y. for further proceedings in conformity with the opinion of Supreme Court. It is further ordered that, Sanford Zwickler recover from Aaron E. Koota, $433.67 for his costs. (J/C)
1-20-68	Copy of record on appeal filed.
1-20-68	Affidavit of Brenda Soloff filed.
1-25-68	Pltff's supplemental brief filed.
2-13-68	Deft's supplemental brief filed.
2-13-68	Appendix for deft filed.

Docket Entries.

DATE	FILINGS—PROCEEDINGS
2-19-68	Reply brief of Pltff to supplemental brief of deft filed.
3-27-68	Pltff's second supplemental brief filed.
3-30-68	Second supplemental brief for deft filed.
4- 3-68	Pltff's reply to second supplemental brief for deft filed.
5- 6-68	By Judges Kaufman, Zavatt, & Rosling, Decision rendered on atty Gen'l application for leave to file a supplemental affidavit—Application denied—Settle order on 10 days' notice returnable on or before May 24, 1968. (See opinion)
5-21-68	By Rosling J—Memorandum to clerk filed advising that footnote 7 of opinion filed May 6, 1968 has been revised with the concurrence of Judges Kaufman and Zavatt. Revised pages 34 and 35 bearing legend "Revised 5/20/58" have been substituted for original pages 34 and 35. Copies of revised pages sent to persons who received the original opinion.
6-18-68	By Judges Kaufman, Zavatt, & Rosling,—Order filed denying deft's motion to dismiss and enjoining deft Koota from arresting or prosecuting pltff. under said statute, also denying deft's application to file supplemental affidavit etc. That pltff recover of deft the sum of $44.36 costs as taxed. This order & Judgment are hereby stayed to and Including July 8, 1968 etc. (P/C mailed to attys)
7- 3-68	Notice of Appeal Filed. (Copy of appeal mailed to Emanuel Redfield, Esq. 37 Wall St. N. Y.)

Docket Entries.

DATE	FILINGS—PROCEEDINGS
7- 9-68	Record on appel certified and mailed to U. S. Supreme Court Washington, D. C.
7-12-68	Receipt returned from U. S. Supreme Court, Washington, D. C. Acknowledging record on appeal.
7-13-68	Certified copy of order of Supreme Court filed that the judgment of the district Court is stayed providing the appellant perfects and dockets his appeal in this Court on or before Aug 5, 1968. Should such appeal be so perfected and docketed by that date this stay is to remain in effect pending the issuance of the judgment of this Court. (memorandum of Mr. Justice Harlan annexed)
8- 7-68	Certification filed, noting that an appeal from U.S.D.C.—E.D.N.Y. was filed in Supreme Court on 8/2/68 etc.
10-21-68	Certified copy of Supreme Court order filed. The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

Summons.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action File No. 66C 375

SANFORD ZWICKLER, *Plaintiff*,

—against—

AARON E. KOOTA, as District Attorney of the County of Kings, Defendant.

SUMMONS RETURNED AND FILED—April 26, 1966

To the above named Defendant:

You are hereby summoned and required to s ve upon Emanuel Redfield, plaintiff's attorney, whose address is 60 Wall Street, New York 5, New York, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Lewis Orgel, Clerk of the Court, By James R. Abram, Deputy Clerk.

Date: April 22, 1966.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[File endorsement omitted]

Amended Complaint.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

66-C-375

[Title omitted]

AMENDED COMPLAINT—Filed May 3, 1966

The plaintiff, by his attorney, Emanuel Redfield, for his Amended Complaint, respectfully alleges:

First: The action arises under 28 U.S.C.A. Section 1343(4) and 28 U.S.C.A. Section 2201, as hereinafter more fully appears.

Second: The plaintiff at all times hereinafter mentioned was and still is a resident of the Borough of Brooklyn, City and State of New York.

Third: That at all times hereinafter mentioned, the plaintiff was and still is a citizen of the State of New York and of the United States of America.

Fourth: The defendant Aaron E. Koota at all times hereinafter mentioned, was and still is the District Attorney of the County of Kings, State of New York.

Fifth: On or about October 29, 1964, a prosecution was commenced against the plaintiff herein by the defendant herein in which plaintiff was charged with having violated Section 781-b of the Penal Law of New York, in that on that day the plaintiff distributed in the Borough of Brooklyn, City of New York, a quantity of a leaflet, a copy of which is hereto annexed as Exhibit I, without containing the name and address of the printer or sponsor of said leaflet.

[File endorsement omitted]

Sixth: The said leaflet referred to the Democratic candidate for the Congress of the United States at an election to be held on November 3, 1964, or about four days after the date of the said distribution.

Seventh: At a trial held on December 11, 1964 in the Criminal Court of the City of New York, County of Kings, the defendant herein produced witnesses on behalf of the People of the State of New York and moved the court for judgment on behalf of the People of the State of New York.

Eighth: At the same trial the plaintiff herein moved for a dismissal of the charge on the ground that the aforesaid statute upon which the prosecution was premised, is unconstitutional in that it violated the Fourteenth Amendment to the Constitution of the United States.

Ninth: The said court overruled the contentions of plaintiff and on February 10, 1965 found plaintiff guilty of having violated said staute.

Tenth: Thereafter the plaintiff perfected an appeal to the Appellate Term of the Supreme Court of the State of New York for the Second Judicial Department.

Eleventh: The said Appellate Term by order dated and entered the 23rd day of April, 1965 reversed the said conviction solely on the ground that there was no adequate proof that the plaintiff had distributed the leaflet "in quantity."

Twelfth: On June 25, 1965 permission was granted to the People of the State of New York to appeal to the Court of Appeals, and the People thereafter perfected such appeal.

Thirteenth: On December 1, 1965 the Court of Appeals unanimously and without opinion or memorandum affirmed the order of the Appellate Term.

Fourteenth: The plaintiff desires and intends to distribute in the Borough of Brooklyn, County of Kings, New York, at the place where he had previously done so and at various places in said County, the anonymous leaflet herein described as Exhibit I and similar anonymous leaflets, all prepared by and at the instance of a person other than the plaintiff. The said distribution is intended to be made at any time during the election campaign of 1966 and in subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966. Such distribution is intended to be made in quanties of more than a thousand copies of such anonymous leaflet.

Fifteenth: Upon information and belief, the person referred to in said leaflet is the present incumbent and will become a candidate in 1966 for reelection to the Congress of the United States and has been a political figure and public official for many years last past.

Sixteenth: Plaintiff intends to distribute said leaflet and similar leaflets anonymously because of his belief and claim that the statute in forbidding the distribution of anonymous literature of the nature described is unconstitutional in violation of the First and Fourteenth Amendments to the Constitution of the United States, in that it is an infringement of the freedom of expression, and that until the statutes is declared constitutional, plaintiff will persist in his claim of the right to make such distribution.

Seventeenth: The said leaflet is embraced within the scope and intendment of the statute.

Eighteenth: The defendant, Aaron E. Koota, previously prosecuted plaintiff and is a diligent and conscientious public officer and pursuant to his duties intends or

will again prosecute the plaintiff for his acts of distribution as aforesaid.

Nineteenth: Because of the previous prosecution of plaintiff for making the distribution of the leaflet, as aforesaid, and because of the threat of prosecution of him, plaintiff is in fear of exercising his right to make distribution as aforesaid and is in danger of again being prosecuted therefor, unless his right of expression is declared by this court, without submitting himself to the penalties of the statute.

Wherefore, plaintiff demands judgment:

1. Declaring that Section 781-b of the Penal Law of New York is unconstitutional in that it infringes upon the rights of the plaintiff under the First and Fourteenth Amendments to the Constitution of the United Sates;

2. Enjoining the defendants, his agents and assistants from prosecuting the plaintiff because of the matters alleged in this complaint;

3. Granting the plaintiff an injunction pending the determination of this action;

4. Directing that this action annd all proceedings thereunder be heard before a three-judge court pursuant to Section 2281 U.S.C.A.

5. Such other and further relief as to the court may seem just.

Emanuel Redfield, Attorney for Plaintiff, Office & P. O. Address, 60 Wall Street, New York 5, New York, HAnover 2-1023.

Exhibit I to Amended Complaint.

REPRESENTATIVE MULTER— EXPLAIN YOUR POSITIONS

AID TO NASSER

On September 2, 1964, an amendment was proposed to a foreign aid bill (Public Law 480). In substance, it would have cut off all aid to the United Arab Republic. Congressman Multer spoke at length against the amendment, and in his own words, urged its defeat "as earnestly as I can". He stated that his position was based on "humanitarian instinct". (Congressional Record 20792).

In this respect, the following should be noted

(a) Congressman Multer's stand permits the diversion of funds by Dictator Nasser to his armaments buildup.

(b) The United Arab Republic is also a recipient of aid from Communist Russia.

(c) Egypt is now employing the technical skills of scientists, formerly under the employ of the Nazis.

(d) Congressman Multer debated against the amendment on the eve of the summit conference held in Cairo by 13 Arab States which are threatening the peace of the Near East and the State of Israel in particular.

SOVIET ANTI-SEMITISM

The 1964 Foreign Aid bill was passed in the United States Senate with an amendment sponsored by Senator Abraham Ribicoff (D., Conn.) that strongly condemned the anti-Semitic practices of the Soviet Union. When this

issue was brought to the House-Senate conferees, a much more general statement decrying all types of religious bigotry was adopted.

Representative Multer praised this "watered down" measure on the House floor, and stated:

> "While the Senate version did point the finger directly at Soviet Russia, the version as finally adopted, I think, is much the better one."
>
> "I believe, instead of pointing the finger at the culprit now before the bar of world public opinion where it is being so severly condemned, it is much better that this Congress go on record as it is doing now, against religious persecution wherever it may raise its ugly head." (Congressional Record 22850).

W H Y MR. MULTER, W H Y ? ? ? ? ?

Duly sworn to by Sanford Zwickler, jurat omitted in prnting.

Affidavit of Service by Mail (omitted in printing).

Plaintiff's Notice of and Motion for Temporary Injunction and to Convene Three-Judge Court—Filed May 3, 1966.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

66-C-375

[Title omitted]

PLAINTIFF'S NOTICE OF AND MOTION FOR TEMPORARY INJUNCTION AND TO CONVENE THREE-JUDGE COURT—Filed May 3, 1966

SIRS:

Please Take Notice that the undersigned pursuant to Rule 65 of the Rules of Civil Procedure, will move this court at a Motion Term in the Federal Building, Washington and Johnson Streets, Brooklyn, New York, on the 18th day of May, 1966 at 10:00 A.M. or as soon thereafter as counsel can be heard.

1. For an order granting a preliminary injunction, in favor of plaintiff, enjoining the defendant from in anywise interfering with the distribution of the anonymous leaflet set forth in the amended complaint or similar ones;

The grounds of this motion are fully set forth in the amended complaint and are that:

(a) The statute under which the defendant is authorized to act, to wit, Section 781-b of the Penal Law of the State of New York is unconstitutional in violation of the First and Fourteenth Amendments to the Constitution of the United States in that:

(i) it operates as a prior restraint on freedom of speech and expression.

Plaintiff's Notice of and Motion for Temporary Injunction and to Convene Three-Judge Court—Filed May 3, 1966.

(b) The enforcement of the said statute will cause immediate and irreparable injury to the plaintiff.

2. To convene for the purpose of hearing and determining this application for a preliminary injunction and this cause, a statutory court of three judges at least one of whom shall be a circuit judge, in accordance with the provisions of Section 2284, Title 28, United States Code;

3. Such other and further relief as to the court may seem just.

Dated: New York, New York, April 28, 1966.

Emanuel Redfield, Attorney for Plaintiff, Office & P. O. Address, 60 Wall Street, New York 5, New York, HAnover 2-1023.

To:

Aaron E. Koota, Esq., Municipal Building, Brooklyn, New York.

CLERK'S NOTE

Amended Complaint and Exhibit I thereto are omitted from the record here as they are printed at pages 2-6 supra.

Affidavit of Service by Mail (omitted in printing).

[File endorsement omitted]

Defendant's Notice of Motion Pursuant to Rule 12b (1)(6) F.R.C.P. to Dismiss Amended Complaint on Jurisdictional Grounds and for Failure to State a Claim Upon Which Relief Can Be Granted—Filed May 4, 1966.

In the United States District Court

Eastern District of New York

Civil Action File No. 375-1966

[Title omitted]

Defendant's Notice of Motion Pursuant to Rule 12b (1)(6) F.R.C.P. to Dismiss Amended Complaint on Jurisdictional Grounds and for Failure to State a Claim Upon Which Relief Can Be Granted—Filed May 4, 1966.

Sir:

Please Take Notice that upon the amended complaint filed in this action and the annexed affidavit of Irving L. Rollins, sworn to the 3rd day of May, 1966, the undersigned will move this Court at a Term for Motions to be heard at the United States Courthouse in the Federal Building, 225 Washington Street, Borough of Brooklyn, City and State of New York on the 18th day of May, 1966 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order dismissing the amended complaint herein pursuant to Rule 12b (1)(6) of the Federal Rules of Civil Procedure on the grounds that (a) this Court lacks jurisdiction of the subject matter of said amended complaint; and (b) that such amended complaint in the absence of diversity of citizenship fails to state a claim within the original jurisdiction of the United States District Court upon which relief can be granted; and for such other and further relief as to the Court may seem just and proper.

[File endorsement omitted]

Affidavit of Irving L. Rollins.

Dated: New York, New York, May 3, 1966.

Louis J. Lefkowitz, Attorney General of the State of New York, Attorney for Defendant, By Irving L. Rollins, Assistant Attorney General, 80 Centre Street, New York, New York 10013.

To: Emanuel Redfield, Esq., Attorney for Plaintiff, 60 Wall Street, New York, New York 10005.

Affidavit of Irving L. Rollins, in Support of Motion.

AFFIDAVIT—Filed May 4, 1966

Civil Action File No. 375-1966

State of New York,
County of New York, ss.:

Irving L. Rollins, being duly sworn, deposes and says:

1. I am an Assistant Attorney General in the office of Hon. Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the defendant herein. The facts hereinafter stated are based upon official record made available to me.

2. I submit this affidavit in support of the defendant's motion pursuant to Rule 12b (1)(6) of the Federal Rules of Civil Procedure to dismiss the amended complaint in the above entitled action on jurisdictional grounds and for failure to state a claim upon which relief can be granted.

3. That Section 781-b of the Penal Law of the State of New York which the plaintiff seeks by the subject action

to declare unconstitutional as violative of the First and Fourteenth Amendments to the Constitution of the United States by allegedly inhibiting the freedom of expression was last amended in its present provisions by Chapter 576 of the Laws of 1962 effective September 1, 1962. This amendment was effected by and as part of the program of Hon. Louis J. Lefkowitz, Attorney General of the State of New York. As New York's Chief Law Enforcement Officer, he was empowered to investigate and prosecute cases arising under the Election Law and under the provisions of the Penal Law relating to crimes against the elected franchise (N.Y. Executive Law, § 69). As the 1962 Legislative Annual shows, the Attorney General wrote the following memorandum to the New York Legislature with reference to such statute:

> "*Printing of political literature* S.I. 1967, Pr. 4531, Conklin Ch. 576
>
> Penal Law, § 781-b. This is an amendment to the 'Printers Ink' law of the early nineteen hundreds. This law currently provides that either the name and address of the printer, or the name and address of the sponsor or person requesting the printing, be printed thereon. In practice, only the printer's name usually appears and the bill is generally ineffectual in dealing with faults or scurrilous campaign literature.
>
> The proposed amendment would require the name and address of the person or group which caused the printing or reproduction of the literature to be printed thereon, in addition to the name and address of the actual printer.
>
> In the 1961 democratic primary election in the city of New York, unusually violent and untruthful anonymous allegations and statements were widely printed and distributed. While in some instances the names of the individuals believed to be responsible were

traced out, responsibility could not be definitely determined.

It would seem any person or committee which reaches the public in writing regarding any person or program of a political nature should accept responsibility for the printed material and its accuracy or answer to any person hurt by any false statement so printed or reproduced.

This bill is part of the program of the Attorney General."

Irving L. Rollins, Assistant Attorney General.

Sworn to before me this 3rd day of May, 1966.

Charles A. LaTorella, Jr., Assistant Attorney General of the State of New York.

Affidavit of Service (omitted in printing).

Opinion of Rosling, J., May 20, 1966.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

66-C-375

SANFORD ZWICKLER, Plaintiff,

—against—

AARON E. KOOTA, as District Attorney of the County of Kings, Defendant.

Appearances:

Emanuel Redfield, Esq., Attorney for Plaintiff.

Aaron E. Koota, Esq., District Attorney of the County of Kings;

Irving L. Rollins, Esq., Assistant Attorney General, Of Counsel.

OPINION—May 20, 1966

ROSLING, J.

Plaintiff moves for an order granting a preliminary injunction in his favor enjoining the defendant District Attorney of Kings County from interfering with his pro-

[File endorsement omitted]

posed distribution of a political leaflet. It is plaintiff's expressed plan that the distribution is to be anonymous in the sense that the leaflet will not comply with the requirement of § 781-b of the Penal Law of the State of New York to print or reproduce on the document the name and post office address of the "printer" as defined in such section.[1]

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[1] § 781-b. Printing or other reproduction of certain political literature.

"No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, whether in favor of or against a political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof and of the person or committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such handbill, pamphlet, circular, post card, placard or letter without also so printing, publishing, or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

"The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed, published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal."

Section 782 declares a first offense a misdemeanor punishable by imprisonment for not more than one year or by a fine of not less than $100 nor more than $500, or by both such fine and imprisonment. A person convicted of a misdemeanor is as to a second or subsequent offense guilty of a felony.

Contending that the enforcement of the statute will cause immediate and irreparable injury to the plaintiff, he additionally asks that a statutory court of three judges be convened in accordance with the provisions of 28 U.S.C. § 2284. Plaintiff maintains that the statute establishing the offense is unconstitutional in its infringement of his rights under Amendments 1 and 14 of the Constitution of the United States.

Defendant cross-moves for an order dismissing the complaint pursuant to Rule 12(b)(1)(6) of the Fed. R. Civ. P. on the ground (a) that this court lacks jurisdiction of the subject matter and (b) that the complaint in the absence of diversity of citizenship fails to state a claim within the original jurisdiction of the United States District Court upon which relief can be granted. In support of his motion plaintiff submits a verified complaint which in its detail violates the prescription of Fed. R. Civ. P. 8(a) that a pleading shall contain a short and plain statement of the claim, but this very detail supplies sufficient evidentiary

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[2] Reed Enterprises v. Corcoran, 354 F.2d 519 (D.C. Cir. 1965) at p. 522: "Ordinarily, in injunction proceedings seeking to restrain enforcement of an allegedly unconstitutional statute, once a substantial question of constitutionality is raised and the complaint 'at least formally alleges a basis for equitable relief,' a three-judge court is required. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715, 82 S. Ct. 1294, 1296, 8 L.Ed.2d 794 (1962). Here the allegations in the complaints unquestionably outline a basis for equitable relief. For the purpose of determining whether three-judge courts are required, these allegations, unless obviously colorable, must be taken as true, and the answers of the Government addressed to three-judge courts."

data to constitute the pleading an adequate affidavit in support of the motion.[2] It would appear that a substantial question is not foreclosed by earlier decision.[3]

Finding, therefore, that the hearing of plaintiff's motion by a three-judge district court is appropriate, the court has, pursuant to 28 U.S. Code 2284, notified the Chief Judge of this Circuit of the application and requested him to designate two other judges to serve with the undersigned as members of the court to hear and determine the action. Plaintiff's motion insofar as it seeks a temporary injunction and defendant's cross-motion to dismiss the complaint will upon such court being constituted be referred to it for hearing and determination.

Settle order on notice.

George Rosling, U. S. D. J.

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[3] Bailey v. Patterson, 369 U.S. 31, 82 S. Ct. 549 (1962); Talley v. California, 362 U.S. 60, 80 S. Ct. 536 (1960); Dombrowski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116 (1965).

Order Designating Judges—May 24, 1966.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

66-C-375

[Title omitted]

ORDER DESIGNATING JUDGES—May 24, 1966

Having been notified by the Honorable George Rosling, United States District Judge for the Eastern District of New York, that an application has been filed in the above matter for relief pursuant to Title 28 United States Code Section 2281, pursuant to Title 28 United States Code Section 2284 I hereby designate the following judges, in addition to Honorable George Rosling, to hear and determine said cause as provided by law: Honorable Irving R. Kaufman, United States Circuit Judge, and Honorable Joseph C. Zavatt, United States District Judge for the Eastern District of New York.

It Is Hereby Ordered that this order be filed in the above entitled cause in the said District Court.

J. Edward Lumbard, Chief Judge, United States Court of Appeals for the Second Circuit.

Dated: New York, N. Y., May 24, 1966.

[File endorsement omitted]

Notice of and Order Granting Motion to Convene a Three-Judge Court, Etc.—Filed May 31, 1966.

In the United States District Court

Eastern District of New York

Civil No. 375/1966

[Title omitted]

Notice of and Order Granting Motion to Convene a Three-Judge Court, Etc.—Filed May 31, 1966

Please Take Notice that the within order will be presented for settlement to the Hon. George Rosling, on May 27, 1966, at 10:00 A.M.

Dated: New York, New York, May 23, 1966.

Yours, etc.,

Emanuel Redfield, Attorney for Plaintiff, Office & P. O. Address, 60 Wall Street, New York 5, New York, HAnover 2-1023.

To: Louis J. Lefkowitz, Esq., Attorney for Defendant, 80 Centre Street, New York, New York.

[File endorsement omitted]

Order, dated May 31, 1966.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

The plaintiff having moved this court for an order granting a temporary injunction and for the convening of a three-judge court pursuant to 28 U.S.C. Section 2284, and the defendant having moved this court for an order dismissing the amended complaint, and the court having considered the amended complaint in support of the motion and the affidavit and motion in opposition thereto, and having heard the arguments of counsel, it is

Ordered, that the motion of the plaintiff for an order to convene a three-judge court pursuant to 28 U.S.C. Section 2284 be and the same hereby is granted; and it is further

Ordered, that the motion of the plaintiff for a temporary injunction and the motion of the defendant for the dismissal of the amended complaint are hereby referred to said three-judge court for hearing and determining said cause.

Dated: New York, New York, May 31, 1966.

George Rosling, United States District Judge.

Affidavit of Service by Mail (omitted in printing).

Excerpt of Hearing of June 9, 1966.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

63-C-375

SANFORD ZWICKLER, Plaintiff,

—against—

AARON E. KOOTA, as District Attorney for the County of Kings, Defendant.

EXCERPT OF HEARING OF JUNE 9, 1966

United States Court House
Brooklyn, New York
11:00 o'clock A. M.

Before:

Honorable Irving R. Kaufman, United States Circuit Court Judge Honorable Joseph V. Zavatt, Chief Judge, United States District Court, Honorable George Rosling, United States District Court Judge.

[File endorsement omitted]

Appearances:

Emanuel Redfield, Esq., Attorney for Plaintiff.

Louis J. Lefkowitz, Esq., Attorney General, State of New York, Attorney for Defendant, By: Irving L. Rollins, Esq., Assistant Attorney General.

Excerpt of Hearing of June 9, 1966.

The Clerk: Civil Hearing. Sanford Zwickler versus Aaron E. Koota, District Attorney, Kings County.

Mr. Redfield: Ready for the plaintiff.

Mr. Rollins: Ready for defendant.

Judge Kaufman: How do you want to proceed on this? Do you want to argue your motion to dismiss first, or do you want to argue your application first?

Mr. Rollins: I will take any recommendation the Court makes.

Mr. Redfield: It doesn't make any difference.

Judge Kaufman: I think it will put it in better perspective if we heard your application to dismiss.

Mr. Redfield: May I suggest, before we begin, your Honor, that counsel for both sides have agreed between themselves that this motion be considered as looking toward a final judgment.

Judge Kaufman: In other words, we are to consider this the hearing on the application for a permanent injunction?

Mr. Redfield: Yes, sir.

Notice of and Order Denying Plaintiff's Motion for Preliminary Injunction and Granting Defendant's Motion to Dismiss the Complaint—Filed September 29, 1966.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket #66 Civ. 375

[Title omitted]

NOTICE OF AND ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND GRANTING DEFENDANT'S MOTION TO DISMISS THE COMPLAINT—Filed September 29, 1966

Please Take Notice that the within order will be presented for settlement on September 22, 1966, at 10:00 A.M. at the United States District Court, Eastern District of New York.

Dated: New York, New York, September 20, 1966,

Yours, etc.,

Emanuel Redfield, Attorney for Plaintiff, Office & P. O. Address, 60 Wall Street, New York 5, New York, HAnover 2-1023.

To: Louis J. Lefkowitz, Esq., Attorney General, 80 Centre Street, New York, New York.

[File endorsement omitted]

Notice of and Order Denying Plaintiff's Motion for Preliminary Injunction and Granting Defendant's Motion to Dismiss the Complaint—Filed September 29, 1966.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket #66 Civ. 375

[Title omitted]

ORDER

The plaintiff, having moved for a preliminary injunction in favor of plaintiff to enjoin enforcement of Section 781-b of the Penal Law of the State of New York on the ground the said law is unconstitutional, and for the convening of a statutory three-judge court to hear said application, and the defendant having moved for an order dismissing the complaint, and the motion for the convening of a statutory three-judge court having been granted by the Hon. George Rosling, United States District Judge, and the said court consisting of the Hon. Irving Kaufman, Circuit Judge of the Second Circuit, the Hon. Joseph C. Zavatt, Chief Judge of the United States District Court for the Eastern District of New York and the Hon. George Rosling, United States District Judge for the Eastern District of New York, having been convened on June 9, 1966 and the said application having been heard on said date and the said court having filed its opinion on September 19, 1966 in favor of the defendant, Judge Rosling dissenting, it is

Ordered, that the motion of the plaintiff for a preliminary injunction be and the same is hereby denied; and it is further

Ordered, that the motion of the defendant to dismiss the complaint be and the same hereby is granted.

Dated: the 29 day of September, 1966.

Irving R. Kaufman, United States Circuit Judge.
Joseph C. Zavatt, United States District Judge.

Affidavit of Service by Mail (omitted in printing).

Opinion and Decision of Three-Judge Court.

66-C-375

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

SANFORD ZWICKLER,

Plaintiff,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Defendant.

Before: KAUFMAN, Circuit Judge, ZAVATT, Chief Judge, and ROSLING, District Judge.

APPEARANCES:

EMANUEL REDFIELD, Esq., Attorney for Plaintiff.

LOUIS J. LEFKOWITZ, Esq., Attorney General of the State of New York, Attorney for Defendant.

SAMUEL A. HIRSHOWITZ, Esq., First Assistant Attorney General.

BRENDA SOLOFF, Esq., Assistant Attorney General, of Counsel.

ROSLING, J.

The mandate of the Supreme Court upon reversal in the context of its opinion[1] requires this three-judge court to determine whether the facts alleged in the plaintiff Zwickler's complaint discloses a controversy with the defendant

District Attorney of sufficient substance to warrant the award of a declaratory judgment. Should we so hold we are called upon then to adjudicate whether the New York statute which plaintiff impugns is so "repugnant to the guarantees of free expression secured by the Federal Constitution" that it should be voided, with or without a grant of injunctive relief against its enforcement for future violation through criminal prosecutions hereafter brought.

The subject statute is § 781-b of the Penal Law of New York State, as in force on April 22, 1966, the date of the inception of the action.[2] In broad outline, as pertinent to plaintiff's situation, the provision, now superseded without change by Election Law § 457, made it a crime to distribute for another, among other things, *any* handbill in quantity which contained *any* statement concerning any candidate in connection with *any* election of public officers, unless there were printed thereon the name and post office address of the printer thereof and of the person at whose instance such handbill was so distributed. The penalties established for infraction were severe. A first offense was declared a misdemeanor; succeeding violations constituted felonies.[3]

Zwickler was convicted of violating § 781-b by his distribution of anonymous handbills no more than mildly critical of a speech delivered on the floor of the House of Representatives by a United States Congressman who was at the time (1964) standing for re-election. The conviction was reversed by the New York Supreme Court, Appellate Term, on state law grounds. The memorandum on reversal stated that the constitutional question had not been reached.[4] The New York Court of Appeals affirmed without opinion, 16 N. Y. 2d 1069.

Zwickler next invoked the Federal District Court's jurisdiction under the Civil Rights Act, 28 U.S.C. § 1343, and the Declaratory Judgment Act, 28 U.S.C. § 2201, by bringing this action against the District Attorney of Kings

County in which he sought a declaration that § 781-b was unconstitutional and an injunction against its enforcement.

We must first decide whether the facts, set out in some detail below, present a controversy of sufficient immediacy to support action for declaratory judgment. We hold that they do and, hence, such declaration should be made.

The statute reviewed is not one which has lapsed into "innocuous desuetude" through a legislature's prolonged disregard and "prosecutorial paralysis" so that the issue of its constitutionality is not here justiciable. We are not in Zwickler confronted as was the court in *Poe* v. *Ullman,* 367 U. S. 497, 81 S. Ct. 1752 (1961), cited by defendant, with eighty years of inactivity on the part of state authorities in implementing the penal statute[5] which the plaintiff had exhumed and proffered to the court so that its invalidity might be declared and theoretical menace to plaintiffs abated. As basis for its rejection of plaintiff's plea for relief four justices of the court in *Poe* joined in the observation that the fact that the state "has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication." 367 U. S. at p. 508. The fifth justice whose concurrence was in the judgment alone does not in his brief memorandum evince a precise agreement with the language quoted.

The thrust of *Poe's* plurality opinion is in effect that whatever private conduct the several plaintiffs originally contemplated taking was in no realistic sense inhibited by the existence of a statute which by "tacit agreement" the Connecticut prosecutors had undertaken not to enforce. The court in a collateral threat of such tenuity could find no significant deprivation by the state of life and liberty without due process of law.

It is otherwise where claims of abridgment of First Amendment freedoms to speak and publish are in question.

The chill of a penal restraint on utterance blights those freedoms by its mere presence. "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *N.A.A.C.P.* v. *Button,* 371 U. S. 415, 433, 83 S. Ct. 382, 338 (1963). "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski* v. *Pfister,* 380 U. S. 479, 487, 85 S. Ct. 1116, 1121 (1965).

While reported prosecutions under § 781-b have been infrequent,[6] this is not necessarily the measure of the effectiveness of the statute to rein in dissent.

A brief review of § 781-b in its mutations as successive legislatures from time to time revisited and strengthened the provisions offers proof of the abiding faith of the law makers in its inhibitory force upon those whom it was intended to chasten. In its most recent form it survived, as Election Law § 457, a massive elision from the Penal Law of what was dead-letter and obsolete, and the effective date, a scant six months removed, betokens a censorial force that is far from spent.

As a penal neophyte (added by the L. 1941, c. 198, effective Sept. 1, 1941), the provision interdicted anonymity in respect of political literature which touched only the election of *public* officers and of candidates for nomination to *public* office.

Effective April 19, 1957, an amendment (L. 1957, c. 717), brought within its lengthening reach the humble post card, and broadened obligatory self-disclosure to sponsorship of matter relative to propositions and amendments of the State Constitution to be voted upon at general elections.

An amendment enacted in 1962 by chapter 576 effective September 1st of the same year generated the version of

the law to which the complaint sub jud. is addressed. The scope of the provision was by such amendment widened so that it would thereafter encompass within its roster of potential felons anonymous publishers and distributors, whereas earlier only printers and reproducers of what was circulated had been menaced. The circle of eligible beneficiaries of the statute as amended was, moreover, enormously expanded, for this was now to include *party* officials and candidates for *party* position as well.

Recodification of the 1966 Penal Law, earlier adverted to, brought in its wake redistribution of many special provisions found therein, and, not inappropriately, as part of these shiftings of locale, § 781-b was translated unchanged to its current situs in the Election Law.[7] The continuing vitality of legislative purpose is made manifest by such reenactment.

The attempt of defendant to moot the controversy and thus to abort a declaration of constitutional invalidity by citing the circumstance that the Congressman concerning whom the Zwickler handbill was published has since become a New York State Supreme Court Justice must fail. When this action was initiated the controversy was genuine, substantial and immediate, even though the date of the election to which the literature was pertinent had already passed. Zwickler had been arrested as he stood in a public street the week before the election, distributing handbills.[8] Their content was germane to the current political campaign. His had been a "citizen's arrest" made by an attorney-member of a political club located a scant 150 feet distant from where Zwickler had stationed himself to make such distribution. The Congressman-candidate was the district leader,—the office is an elective party position—, of this club. The attorney was a precinct captain of that club. He testified to the incident as follows:

He had asked Zwickler

> "[w]ho gave you the authority to hand out, who printed this literature, who is the name of the sponsor?" He said, 'none of your business.'"
>
> * * *
>
> "I said, well you know, you are violating the law. He said, if I am violating the law why'nt you have me arrested, so I said, well, I asked Mr. Levine to go and get an officer and asked the officer to make this civil arrest. They called the police station. The lieutenant and the sergeant came down with a police car and finally he consented to go into the police car and we went down to the police station and I made this arrest. When I came down there I said if he gives me his name and address and who sponsored this literature I will not make the complaint and he refused to do that and the lieutenant had no other alternative but to book him on this charge."

The charge was prosecuted on behalf of the state by an *Assistant District Attorney* of the county. Although the "offense" was committed on October 29, 1964, the case was not tried until December 11, 1964, weeks after the general election had been held. More weeks elapsed before, on February 10, 1965, Zwickler was adjudged guilty and sentenced. The punishment meted out by the court was 30 days imprisonment in the Workhouse. Sentence was suspended but its menace hung over him. For a like offense subsequently committed § 782 admonished him that he would be indictable on a felony charge.

In the appeal to the Appellate Term of the Supreme Court which followed, the state as respondent continued to be represented by the District Attorney. That court on April 23, 1965, reversed and dismissed, but explicitly

failed to reach the question of constitutionality (see supra p. 3 and footnote appended). The prosecutor yet gave no hint of any abating of zeal. Further appellate consideration was not automatic, but was premised on leave being granted by a judge of the State Court of Appeals. Permission was applied for and obtained.

It was not until December 1, 1965, that the Court of Appeals by its affirmance, rendered without opinion and, hence, without reaching the constitutional question, upheld the action of the Appellate Term. Until it had done so, Zwickler could have been foolhardy indeed had he chosen to circulate political literature for the 1965 elections without certifying its provenance as § 781-b enjoined. Commission of a second and similar offense would, in the event the Court of Appeals restored the original judgment of conviction, have confronted Zwickler with the very real possibility that the trial judge would reinstate the 30 day sentence of imprisonment which he had suspended, and might have drawn a felony indictment as well.

The consequences thus evoked were too dangerous for Zwickler to ignore. He chose, as a prudent alternative to the martydom that he might have embraced, to file his current complaint in this court. The suit was begun with reasonable promptitude on April 22, 1966, less than five months after the Court of Appeals' inconclusive affirmance. It is seen, therefore, that no dilatoriness on his part has prolonged the chill of his first conviction. Indeed, our own abstention after he brought the action has markedly protracted his period of uncertainty.

Zwickler's complaint, quite properly, instances this seminal episode of harassment as illustrative of the impact upon him of an overbroad statute and as giving substance and immediacy to the threat of future inhibitory action which justify his demand for a declaration of invalidity.

The fortuitous circumstance that the candidate in relation to whose bid for office the anonymous handbill was circulated had, while vindication inched tediously forward, removed himself from the role of target of the 1964 handbill does not moot the plaintiff's further and far broader right to a general adjudication of unconstitutionality his complaint prays for. We see no reason to question Zwickler's assertion that the challenged statute currently impinges upon his freedom of speech by deterring him from again distributing anonymous handbills. His own interest as well as that of others who would with like anonymity practice free speech in a political environment persuade us to the justice of his plea.

Evers v. *Dwyer,* 358 U. S. 202, 79 S. Ct. 178 (1958), provides the rubric for our holding and a gloss upon it. In *Evers* the Supreme Court considered, and held appropriate for its determination, the claim of a Negro resident of Memphis, Tennessee, that he was entitled to a judicial declaration in his own behalf and for others similarly situated that he was authorized in the exercise of a constitutional right to travel on a bus without being subjected under state law to segregated seating arrangements because of race. He had boarded the bus on only a single occasion, admittedly to test that right, and had left the bus when threatened with arrest for essaying to exercise it.

Despite the inchoate nature of his experience the court accepted jurisdiction and struck down the provision as invidious. The standard *Evers* articulates is not, however, to be limited to the particular rights it vindicates. With a broader reach and by necessary logic it draws beneath its protective canopy the grievances of those who are subjected by statute to special disabilities in the exercise of First Amendment freedoms as well. The aborting of the incident which was cited as illustrating the invasion of the right in *Evers* did not abate the "actual controversy."

This was held to be substantial and persistent until it should be resolved by the declaration solicited by petitioner. So long as the right remained unvindicated, he preserved "a substantial, immediate and real interest in the validity of the statute which imposes the disability" and was entitled to have that right adjudged. 358 U. S. at p. 204, citing *Gayle* v. *Browder,* 352 U. S. 903, 77 S. Ct. 145 (1956).

The underlying controversy does not cease to serve as a predicate for such judicial declaration notwithstanding that the plaintiff halts his challenge short of arrest, as in Evers, nor of a second arrest as in the case of Zwickler. "We do not believe that appellant, in order to demonstrate the existence of an 'actual controversy' over the validity of the statute here challenged," the *Evers* opinion reads (p. 204), "was bound to continue to ride the Memphis buses at the risk of arrest if he refused to seat himself in the space in such vehicles assigned to colored passengers."

The declaratory judgment action is designed precisely to give one, potentially a defendant in a criminal prosecution, access to a judicial determination prior to actual arrest when the facts indicate a sufficient basis for his belief that conduct he deems protected under the First Amendment will subject him to such prosecution.

Reaching, accordingly, the plaintiff's challenge to the constitutionality of § 781-b, we turn to a consideration of his contention that the statute is impermissibly "overbroad" in that it imposes its obligations and sanctions indiscriminately upon those whose writings politically circulated fall within the protection of the First Amendment and those who, by the criminal content of their text, have placed themselves outside the pale of such protection. The supplemental brief defendant now submits concedes that the statute does indeed make no distinction between the two groups.[9] Thereby the Attorney General yields as no

longer tenable the position he earlier maintained at the hearing before us that the overbroad statute could be reduced to a constitutional dimension by reading into it attenuating decisions of the state courts yet to be rendered. By such judicial snipping and cropping the state's attorney hoped ultimately so to circumscribe the statute's intent that only such political literature as was criminally libelous would be brought under constraint to disclose sponsorship. For those who were appropriately discreet in their political criticism, or, for that matter, in according praise and approval, the statute in express terms being operative as to both pro and con, anonymity would be lawful and go unwhipped. Thus the requisite narrowing of the statute to satisfy First Amendment proscriptions would, hopefully be achieved.

The legislative and judicial syllogism which led the Attorney General to propose such argument initially, and now compels him to abandon it in favor of his current thesis that anonymity alone suffices in a politcal context to delineate the misdemeanor-felony irrespective of the truth or falsity of what is circulated, is clear, but at the same time provides its own refutation. Central to defendant's dilemma is *Talley* v. *California,* 362 U. S. 60, 80 S. Ct. 536 (1960), the force of which cannot be limited to the answer the court gave to the factual question posed to it, namely, "whether the provisions of a Los Angeles City ordinance restricting the distribution of handbills abridge[s] the freedom of speech and press secured against state invasion by the Fourteenth Amendment of the Constitution."

The city's counsel had urged as underpinning constitutionality that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. "Yet," the court rejoined, "the ordinance is in

no manner so limited, nor have we been referred to any legislative history indicating such a purpose." The opinion is, however, quick to disclaim any implication that an ordinance thus conceived and focused would survive the constitutional challenge if made. The opinion continues (362 U. S. at p. 64):

> "[W]e do not pass on the validity of an ordinance limited to prevent these or any other supposed evils. This ordinance simply bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires.
>
> "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' Lovell v. City of Griffin, 303 U. S. at page 452, 58 S. Ct. at page 669."[10]

Two years after it was decided the courts of New York State were themselves to read the *Talley* teachings in such expansive sense. In *People* v. *Mishkin*, 17 A. D. 2d 243 (1st Dept. 1962), aff'd without opinion, 15 N. Y. 2d 671 (1964), section 330, subd. 2 of the state's General Business Law came under their consideration. The provision as then in force required that *every* publication other than newspapers and magazines should "conspicuously have imprinted * * * the true name and address of the publisher or printer."

The Appellate Division in a brief memorandum which affirmed a finding of Mishkin's guilt under counts not here pertinent charging violation of an obscenity statute voided

his conviction as to other counts filed under the General Business Law. The court grounded the reversal on a determination that § 330 subd. 2 was unconstitutional under constraint of *Talley*. The *Mishkin* memorandum contained an obiter which the legislature, as noted shortly, later construed as a guide for an amendment which by mitigating the force of the original provision placed it, hopefully, beyond the strictures of the Talley teachings. The Appellate Division's comment read:

> "The District Attorney suggests that the statute may be found constitutional if its application is limited to obscene publications for there would be a purpose in facilitating the discovery of the publisher. But the statute itself is not so limited, and there is nothing to indicate that this was the legislative purpose. We do not reach the question whether such a purpose would validate the statute."

Taking the negative expression in the final sentence of the Mishkin dictum quoted above as an affirmation of its converse, which it assuredly was not, the legislature proceeded to amend the second subdivision of § 330 so that its mandate and the sanctions for violation were thereafter to be operative upon only such writings as were "composed or illustrated as a whole [so] as to be devoted to the description or portrayal of bondage, sadism, masochism or other sexual perversion or to the exploitation of sex or nudity." These writings, but not those free of the taint described, were under the statute required to set forth at the end of the published matter the name and address of the publisher or printer.

Whether the Mishkin-prompted amendment, upon the validity of which the courts of the state do not appear as yet to have ruled, will be able to withstand further *Talley*

oriented attacks does not here concern us, for § 781-b, the provision we review, has been subjected to no such narrowing. The legislature has not amended it, nor has any court interpreted it in such fashion that anonymity is to be penalized only as to hardcore foulness which the First Amendment will not protect.

Defendant's problem has, indeed, been compounded by a negative legislative action. For the same recodification of the Penal Law, effective September 1, 1967, which transferred § 781-b to the Election Law, therein to be renumbered § 457, has through omission repealed without comment the ancient provisions which theretofore constituted and delineated the crime of libel.[11] One may now, therefore, in the State of New York with a curious impunity, save for exposure to a claim for civil damages, circulate an anonymous tract which falsely charges a clergyman with adultery, but one dare not in an anonymous handbill truthfully publicize the sale of elective office lest he be held to answer criminally.

Anonymity alone, according to defendant, is the touchstone of the offense, but only if perpetrated in a political environment. Government assistance to a public figure, however, in ferreting out a "traducer" whom he may the more readily identify and from whom he may seek civil damages as balm for his individual smart at criticism of his official performance weighs in the balance as too high a toll to be exacted from First Amendment freedom of expression for all. The freedom to animadvert upon public figures and affairs primes all others.

Nor does it avail defendant to urge upon us that § 781-b "protects the integrity of the electoral process * * * by facilitating the enforcement of various anti-corruption provisions in Election Law."[12]

The provisions of that law which the brief brings forward as the strongest it can muster in justification of this undercutting of the First Amendment focus on matters unrelated to the "protected liberties", and, so to speak, tangentially abrade them. Sections 320 through 328, the first of those cited by the Attorney General, comprise Article 13 of the Election Law, which is captioned "Campaign Receipts, Expenditures and Contributions". They contain directions for the filing at specified intervals by political committees, candidates and other persons of relevant statements.

The other sections tendered as support were transferred from their original home in the Penal Law under the revision effective September 1, 1967, and now are incorporated in Article 16, a new division of the Election Law, entitled "Violations of the Elective Franchise." Nothing in their content indicates a direct legislative purpose that implementation of these administrative regulations touching the exercise of the elective franchise shall diminish or erode the major First Amendment right to speak freely in political matters. Of these provisions § 447 denounces and penalizes political assessments on public employees; § 454 forbids candidates for judicial office, and § 460, corporations, to make political contributions.

It is true—if one were to follow defendant's reasoning —that were every colporteur constrained by statute to disclose whose money it was that paid the printer of the tract he hawks, the information thus extruded might in some instances blaze a trail to a criminal source or misuse of funds. A constitutional right of those privileged to speak with anonymity unbreached, however, may not be disregarded to facilitate the prosecution of others who by their offending may have forfeited that right.

The current attitude of the Courts is to place the emphasis on the protection and preservation of the freedom of the many to advocate conduct or to reprehend misconduct in public affairs, not to redress the wrongs, real or fancied, of the individual office holder or aspirant, for what is uttered concerning his past or prospective management of those affairs.

"[N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct". *The New York Times Co.* v. *Sullivan,* 376 U. S. 254, 273, 84 S. Ct. 710, 722 (1964). Indeed with libel no longer a crime, the civil claim asserted in a political context is well-nigh moribund, surviving only when the officer whose official conduct is aspersed can demonstrate an actual malice in the false speaking (id. p. 283). But the threat which chills free expression remains, "the fear of damage awards * * * may be markedly more inhibiting than the fear of prosecution under a criminal statute". (id. p. 277, citing City of Chicago v. Tribune Co., 307 Ill. 595, 607, 139 N. E. 86, 90 (1923)).

The more efficient administration of the ancillary procedures which concern the Attorney General must give room to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." (id. p. 270, citing Terminiello v. Chicago, 337 U. S. 1, 4, 69 S. Ct. 894 and DeJonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255).[13]

Talley declares (p. 539) that the Los Angeles ordinance which it invalidated "like the Griffin, Georgia[14] ordinance, is *void on its face*". (Emphasis supplied.) The Los Angeles provision banned distribution of handbills which did not identify their source. Registration of the distributor with the municipality, however, was not commanded.

The *Griffin* ordinance, on the other hand, while stipulating that a license be obtained before the printed matter was disseminated, did not outlaw anonymity of the sponsor.[15] *Talley's* reading of *Griffin* was that the Court in *Griffin* had similarly "held *void on its face* an ordinance that comprehensively forbade any distribution of literature at any time or place in Griffin, Georgia, without a license." (p. 537) (Emphasis supplied.)

Talley thus assimilates, as equally invalid on their face, provisions which merely bar anonymity and those which require licensing of matter which is constitutionally protected.

Talley cites *Bates* v. *City of Little Rock,* 361 U. S. 516, 80 S. Ct. 412 (1960), and *N.A.A.C.P.* v. *State of Alabama,* 357 U. S. 449, 78 S. Ct. 1163 (1958), by contrast as illustrative of invalidity, not on the face of a statute, but as generated by the *application* of the statute. Recognizing that the statute was enacted within a field of legislative competence, the Court nevertheless ruled it must be stricken as cutting too deeply into the favored First Amendment enclave. The *Talley* opinion brackets its citation of *Bates* and *N.A.A.C.P.* with a comment which marks the "void-on-face" as a distinct category from that of the "void by reason of application". Such comment reads:

> "We have recently had occasion to hold in [these] two cases that there are *times* and *circumstances* when States may not compel members of groups engaged in dissemination of ideas to be publicly identified. [citing *Bates* and *N.A.A.C.P.*]. The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." (Emphasis supplied.)

In *Bates* the government had demanded the membership lists of the *N.A.A.C.P.* in ostensible aid of its power as a municipality to tax a business within its corporate limits. The Court, recognizing the taxing power as basic to the ultimate purpose and function of government, nevertheless, found the legislative action so "significantly to impinge upon constitutionally protected freedom [that] it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." In the companion *N.A.A.C.P.* case the Association successfully resisted a governmental demand that it open up for judicial visitation the corporate roster of its members and contributors.

The Attorney General's argument here that a sufficient justification may be found for overriding First Amendment freedoms in the benefit that would accrue to the authorities charged with the duty of investigating corrupt practices in election campaigns receives an answer in the *N.A.A.C.P.* case at page 461, the opinion at that point reading:

> "Similar recognition of possible unconstitutional intimidation of the free exercise of the right to advocate underlay this Court's narrow construction of the authority of a congressional committee investigating lobbying and of an Act regulating lobbying, although in neither case was there an effort to suppress speech. United States v. Rumely, 345 U. S. 41, 46-47, 73 S. Ct. 543, 546, 97 L. Ed. 770; United States v. Harriss, 347 U. S. 612, 625-626, 74 S. Ct. 808, 815-816, 98 L. Ed. 989. The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of

freedom of press assured under the Fourteenth Amendment. Grosjean v. American Press Co., 297 U. S. 233, 56 S. Ct. 444, 80 L. Ed. 660; Murdock v. Pennsylvania, 319 U. S. 105, 63 S. Ct. 891, 87 L. Ed. 1292."

Harriss, cited by defendant,[16] and the companion *Rumely* case are noted in the foregoing excerpt only to stress the limited authority of a state to intrude upon First Amendment freedom of utterance. The cases are seen to concern special situations in which within a narrowly limited area encroachment upon First Amendment anonymity is tolerated so that an exigent national interest may be safeguarded. Beyond the bounds delineated, encroachment confronts an insurmountable bar in that Amendment. And it is in this outer precinct of freedom that § 781-b assumes, and, hence, impermissibly to function.

In *Rumely,* respondent, an officer of an organization engaged in the sale of books of a "particular tendentiousness", had refused to disclose to a "House Select Committee on Lobbying Activities" the names of those who made bulk purchases of his books for further distribution. To the Committee the lower house had delegated the task of investigating "all lobbying activities intended to influence, encourage, promote, or retard legislation." The extent of "the controlling charter of the committee's powers" came into consideration by the Court in its review of Rumely's conviction for his alleged contempt in the context outlined. Specifically, the terms "lobbying" and "lobbying activities", undefined in the Act, were, according to the Court, necessarily to be delimited to avoid "serious constitutional questions."

"Surely it cannot be denied", the Court's opinion observes, "that giving the scope to the resolution for which the Government contends, that is, deriving from it the

power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment." 345 U. S. 41, 46, 73 S. Ct. 543, 546 (1953).

Those doubts the Supreme Court laid to rest by adopting the restrictive meaning the Court of Appeals had ascribed to the enactment, namely that it was to be held applicable only to "representations made directly to the Congress, its members or committees." If "lobbying" as the term is used in the resolution were to be interpreted as compassing "attempts 'to saturate the thinking of the community'" and "to cover all activities of anyone intending to influence, encourage, promote or retard legislation" the constitutional infirmity sought to be avoided would arise.

The *Harriss* case concerned a related juridical area, that of violation of the Federal Lobbying Act (60 Stat. 812, 839; 2 U.S.C. §§ 201-270). It instances a parallel judicial pruning designed to bring a disclosure statute too diffusive in its scope within constitutional bounds. Read literally, the registration requirements of the Act were broadly imposed upon all persons whose activities were purposed "[t]o influence, directly or indirectly, the passage or defeat of any legislation by the Congress." As in *Rumely* the *Harriss* opinion held (p. 623) that "the intended method of accomplishing this purpose must have been through direct communication with members of Congress", and that the reach of the Act as thus foreshortened does not in its other provisions "violate the freedoms guaranteed by the First Amendment—freedom to speak, publish, and petition the Government." (id. p. 625).

The lobbyist may, accordingly, in anonymity constitutionally protected, purvey his wares without penalty or

restraint when his approach is to others than members of Congress.

American Communications Ass'n v. *Douds*, 339 U. S. 382, 70 S. Ct. 674 (1950), another case relied upon by defendant, concerns itself with the problem of Communist infiltration of the labor movement. This the Court found to present a danger to freedoms of speech, press and assembly so significant that these freedoms could in its view be preserved only if constitutional government itself were to survive. Protection against unlawful conduct and incitement to commit unlawful acts were held to constitute a vital national interest for survival. The safeguarding of that interest, accordingly, justified as constitutionally permissible so much of the Labor Management Relations Act, 1947, 29 U.S.C. § 159(h) as conditioned recognition of a labor organization on the filing of affidavits by its officers that they did not belong to the Communist Party nor believe in the overthrow of the government by force.

> "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech," so reads the opinion of the Court (p. 399)—"the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented. The high place in which the right to speak, think, and assemble as you will was held by the Framers of the Bill of Rights and is held today by those who value liberty both as a means and an end indicates the solicitude with which we must view any assertion of personal freedoms. We must recognize, moreover, that regulation of 'conduct' has all too frequently been employed by public authority as a cloak to hide censorship of unpopular ideas. We have been reminded that 'it is

not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control.' "

Here the conduct which the legislature reprehends and undertakes to regulate by § 781-b is, without demarcation of the boundary between the two groups, the conduct of those who are in no sense culpable and that of those who are, or at least may be held so. No "vital national interest" cries out for protection through truncation of First Amendment rights when all the threat comes from a citizen's standing at a subway exit and peddling his tracts, be they religious, political, or whatever and sundry. Nor may freedom of utterance be stifled, though the street be littered by the rain of discarded handbills. Neither the distributors, nor the distribution, but only the litterer may be proceeded against for violation of the Sanitary Code. (Schneider v. State, 308 U. S. 147, 60 S. Ct. 146 (1939). Cf. Wolin v. Port of New York Authority, 2d Cir., decided March 1, 1968. "[R]egulation of 'conduct' has all too frequently been employed by public authority as a cloak to hide censorship of unpopular ideas," *American Communications Ass'n* v. *Douds, supra,* 339 U. S. at page 399, admonishes us.

The tide of judicial thinking floods too strongly today in the estuary of First Amendment freedom for any tributary of government power in its exercise to overbear it.

Thus we see the Supreme Court when it revisited the troublesome Subversive Activities Control Act in 1967, in *United States* v. *Robel,* 389 U. S. 258, 88 S. Ct. 419 (1967), with a broad stroke sweeping into the discard a major

fraction of that Act. It was an unconstitutional proscription of the First Amendment right of association, the Court held, for a statute, overbroad in its abridgment of such right, to make it unlawful for a member of a Communist-action organization to engage in any employment in any defense facility. The statute, the Court declared, could not without substantial rewriting of its clear and precise provisions be narrowed to a constitutional scope. The statute "contains the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights." [Citing cases.] In summation, "when legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms." (Citing cases.)

Lamont v. *Postmaster General of United States,* 381 U. S. 301, 85 S. Ct. 1493, decided in 1965, marches abreast with *Robel* and *Griswold* in rejecting earlier views[17] of the Court in this area. *Lamont* struck down a federal statute which required the department to detain and destroy unsealed mail from foreign countries determined to be communist political propaganda unless the addressee had returned a reply card sent him by the postal authorities indicating his desire to receive such piece of mail. The Court, resting its determination "on the narrow ground that [inasmuch as] the addressee in order to receive his mail must request in writing that it be delivered" ruled that the requirement amounted "to an unconstitutional abridgment of the addressee's First Amendment rights." The "affirmative obligation" to act in order to have mail released to the addressee "is almost certain to have a deterrent effect, especially as respects those who have sensi-

tive positions. * * * [A]ny addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.' The regime of this Act is at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment. *New York Times* v. *Sullivan,* 376 U. S. 254, 270."

The case of *Mills* v. *State of Alabama,* 384 U. S. 214, 86 S. Ct. 1434 (1966), matches these others in providing a bench mark for the cresting flood. In *Mills* it appeared the legislature had assumed to promulgate a rule of "fair play" in the solicitation of votes by barring electioneering on the day the election was to be held. To hold that a newspaper editor who was charged with having wielded his pen on the forbidden day thereby rendered himself amenable to the sanctions of the statute, the State Supreme Court found itself forced to construe the provision as a valid exercise of the State's police power. The press "restriction, everything considered, is within the field of reasonableness," and "not an unreasonable limitation upon free speech." 278 Ala. 188, 195, 196, 176 So. 2d 884, 890.

The Supreme Court's views were briefly expressed and vigorously to the contrary. "Whatever differences may exist about interpretations of the First Amendment", it generalized, "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." And specifically: "It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press."

It brushed aside as of no moment the state court's apology that the statute was

> "a salutary legislative enactment that protects the public from confusive last-minute charges and counter-

charges and the distribution of propaganda in an effort to influence voters on an election day; when as a practical matter, because of lack of time, such matters cannot be answered or their truth determined until after the election is over."

No "test of reasonableness" serves to save the "state law from invalidation as a violation of the First Amendment."

Penal Law § 781-b, and its successor, Election Law § 457, are, accordingly, adjudged invalid as an abridgement of rights secured by the First Amendment, and injunctive relief to implement such declaration of invalidity is decreed.

For reasons which appear from the foregoing and for want, in any event, of materiality in what the Attorney General, as movant, seeks leave to submit, his application that he be permitted to file a supplemental affidavit and the exhibit he annexes thereto is denied. The record on appeal to the state Court of Appeals on Zwickler's conviction is already before us.

Setttle order on ten days' notice returnable on or before the 24 day of May, 1968.

IRVING R. KAUFMAN,
Circuit Judge.

JOSEPH C. ZAVATT,
Chief Judge.

GEORGE ROSLING,
District Judge.

FOOTNOTES

[1] 389 U. S. 241, 88 S. Ct. 391 (1967), reversing 261 F. Supp. 985 (E.D.N.Y. 1966).

[2] Penal Law § 781-b (now superseded in identical language by Election Law § 457, added L. 1965, c. 1031, § 43 eff. Sept. 1, 1967) reads:

> "No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, whether in favor of or against a political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof and of the person or committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such handbill, pamphlet, circular, post card, placard or letter without also printing, publishing, or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.
>
> "The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed, published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal."

[3] Penal Law § 782, (repealed and simultaneously re-enacted as Election Law § 458, similarly effective on September 1, 1967).

[4] "In our opinion, the People failed to establish that defendant distributed anonymous literature 'in quantity' in violation of the provisions of Section 781(b) [sic] of the Penal Law. We do not reach the question of the constitutionality of the statute involved". People v. Zwickler, Sup. Ct. App. Term, Kings Co., April 23, 1965 (unreported), as quoted in Zwickler v. Koota, 261 F. Supp. at 987.

[5] The laws whose constitutionality was challenged in Poe were "Connecticut statutes which, as authoritatively construed by the Connecticut Supreme Court of Errors, prohibit the use of contraceptive devices and the giving of medical advice in the use of such devices. In proceedings seeking declarations of law, not on review of convictions for violation of the statutes, that court has ruled that these statutes would be applicable in the case of married couples and even under claim that conception would constitute a serious threat to the health or life of the female spouse." 367 U. S. at p. 498. The Fourteenth Amendment alone was cited in the plurality opinion. First Amendment freedoms were not mentioned except in the dissents.

[6] In addition to the Zwickler prosecution there are reported People v. Clampitt, 34 Misc. 2d 766 (Ct. of Spec. Sessions 1961); and North End Democratic Club v. Attorney General, 31 Misc. 2d 1000 (Sup. Ct. Special Term, N. Y. County 1961).

[7] Section 69 of the New York State Executive Law confers upon an Attorney General of the State, whose office is elective and nonjudicial, broad powers and duties respecting "crimes against the elective franchise." Although the statute vests him with no express authority to censor or to silence criticism, the chilling effect on first amendment freedom of expression through exposure of an anonymous critic to governmental investigative procedures and, if his identity is thereby ascertained, to prosecution for his anonymity though what he has uttered be unexceptionable, is manifest. Among an Attorney General's powers are those of investigation with authority to subpoena, of execution of warrants of arrest by appointees empowered to act as peace officers, and of invocation of assistance from members of the police, sheriffs and other public officers in achieving the objectives of the section.

[8] Undisputed facts testified to before Criminal Court Judge Ryan as reported in New York Court of Appeals Record on Appeal. This document is before the Court without defendant's motion, which is accordingly unnecessary, for leave to file it as an exhibit.

[9] The footnote, defendant's brief p. 17, reads with underscoring of the original preserved:

> "Defendant does not contend, as plaintiff appears to suggest, that the statute's reach is *limited* to scurrilous or libelous literature. The statute, by its terms, does not attempt to assess the nature of the language published and does not promulgate any standards other than anonymity. The statute applies to all anonymous *campaign* literature. As will clearly appear, *infra* , the evil aimed at is anonymity and it is not the purpose of the statute to prevent *any* kind of utterance. The public is entitled to know the source of any campaign utterance. Plaintiff's contention, therefore, that the statute is 'overbroad' is wholly untenable."

[10] Justice Black, delivering the brief opinion in Talley, provides an eloquent historical note which adumbrates the path the Court has in the eight intervening years traversed and lights the way for its future libertarian course. The note reads (id. pp. 64 and 65):

> "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes."

[11] The sections thus omitted from the revision of the Penal Law are with their descriptive headnotes the following: § 1340—Libel defined; § 1341, Libel a misdemeanor; § 1342, Malice presumed; defense to prosecution; § 1343, Publication defined; § 1344, Liability of editors and others; § 1345, Publishing a true report of public official proceedings; § 1346, Privileged communications; § 1348, Furnishing libelous information; § 1349, Furnishing false information.

Only Penal Law § 1347 is preserved, but, renumbered § 155.05(2), is transferred to Article 155, "Larceny," of the Revised Penal Law. In new associations it is with extensive paraphrase brigaded with offenses falling generally within the definition of extortion effected by speech or silence.

[12] The Attorney General adduces § 612 of 18 U.S.C. designed to "enforce other provisions of the Federal Corrupt Practices Act,

2 U.S.C. §§ 241-256", as furnishing by its mere existence a constitutional prop for § 712-b, a provision of like import. The history he cites for the federal enactment is unhelpful. It consists of Attorney General Francis Biddle's brief letter dated April 7, 1944, addressed to the Chairman of the Committee on the Judiciary of the Senate, responsive to the Senator's request for the Justice Department's views concerning the bill. This he summarizes as one "to provide that no person shall publish or distribute any political statement relating to a candidate for election to any Federal office which does not contain the name of the person responsible for its publication or distribution."

Nothing without elaboration that the proposed law "would implement the Federal Corrupt Practices Act" and "tend to facilitate the enforcement of the provisions of that act, especially those which require reports of expenditures and contributions" and of the Hatch Act (then 18 U.S.C. § 61 (m)) limitation of $5,000 on contributions in connection with Federal elections, Mr. Biddle's letter announced: "I find no objection to the enactment of the bill." The Senate report to which the letter is appended provides no history of its own, but rests its approval of the bill on the Biddle letter. The report prefaces the Attorney General's ex cathedra with the following uninformative comment: "The Department of Justice having considered the legislation reports an *analysis* in the following letter:" (S. Rep. No. 1390, 78th Cong. 2d Sess., 2 (1944).) (Emphasis added.)

As the Senate report says too little, so the report of the "President's Committee on Civil Rights, to Secure These Rights," pp. 51-53 (1947), an additional document cited indefinitely by defendant in this context, says too much. It propounds the thesis that "the volume and skill of modern propaganda make identification of the source of an argument essential to its evaluation." Decrying the circulation of "anonymous hate-mongering or other subversive literature" the extent of which it acknowledges it does not know, the Committee declares its belief that the "principle of disclosure is * * * the appropriate way to deal with those who would subvert our democracy by revolution or by encouraging disunity and destroying the civil rights of some groups."

Talley disagrees, and the Congress has, in the score of years that have passed since these views of the Committee were expressed, made no move to implement them.

[13] Cf. Garrison v. State of Louisiana, 379 U. S. 64, 85 S. Ct. 209 (1964), in which the Supreme Court extends the New York Times principle so as to bring down the Louisiana criminal libel statute upon parallel reasoning.

[14] Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666 (1938).

[15] The ordinance does not appear to have precluded to preservation of anonymity despite the licensing procedure it established. Application by an attorney or agent for an undisclosed principal for the license was a procedure not inconsistent with the intent of the indefinitely worded provision.

[16] The defendant's brief characterizes Harriss as presenting "the most analogous situation to that in the instant case."

[17] See Lewis Publishing Co. v. Morgan, 229 U. S. 288, 33 S. Ct. 867 (1912).

Order and Decree, dated June 18, 1968.

Jun 18 1968

66-Civ.-375

ORDER AND DECREE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

SANFORD ZWICKLER,

Paintiff,

against

AARON E. KOOTA, as District Attorney of Kings County,

Defendant.

The plaintiff, having moved for a preliminary injunction in favor of plaintiff to enjoin enforcement of Section 781-b of the Penal Law of the State of New York (now Section 457 of the Election Law of the State of New York) on the ground the said law is unconstitutional, and for the convening of a statutory three-judge court to hear said application, and the defendant having moved for an order dismissing the complaint, and the motion for the convening of a statutory three-judge court having been granted by the Hon. George Rosling, United States District Judge, and the said court consisting of the Hon. Irving Kaufman, Circuit Judge of the United States for the Second Circuit, the Hon. Joseph C. Zavatt, Chief Judge of the United States District Court for the Eastern District of New York and the Hon. George Rosling, United States District Judge

for the Eastern District of New York, having been convened on June 9, 1966, and the said application having been heard on said date and the said court having filed its opinion on September 19, 1966, in favor of the defendant, Judge Rosling dissenting, and the plaintiff having appealed to the Supreme Court of the United States from the order of this court dated September 29, 1966, which dismissed the complaint, and the Supreme Court having reversed the order on December 5, 1967, and remanded the action for disposition by this court, and this court having reconvened for consideration of the briefs of the parties without holding further oral argument and the parties having stipulated at the hearing on June 9, 1966, that the court treat plaintiff's motion as one for final judgment, and the court having rendered its written decision dated May 6, 1968, holding that the case presents a justiciable controversy and is not moot, and declaring said statute to be invalid as abridging plaintiff's rights under the First Amendment to the Constitution of the United States, and that plaintiff is entitled to a decere to that effect, together with injunctive relief, it is

ORDERED, ADJUDGED AND DECREED, that the defendant's motion to dismiss the amended complaint be and the same hereby is denied; and it is further

ORDERED, ADJUDGED AND DECREED, that Section 457 of the Election Law of the State of New York, is invalid as repugnant to the Constitution of the United States in that it abridges the rights secured to the plaintiff under the First Amendment to the Constitution of the United States; and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant, Aaron E. Koota, his agents and employees, are hereby enjoined from arresting or prosecuting plaintiff under said statute; and it is further

Order and Decree, dated June 18, 1968.

ORDERED, that the defendant's application to file a supplemental affidavit together with the exhibit annexed thereto is hereby denied; and it is further

ORDERED AND ADJUDGED, that the plaintiff, Sanford Zwickler, of 7314 21st Avenue, Brooklyn, New York, do recover of the defendant Aaron E. Koota as District Attorney of Kings County Municipal Building, Brooklyn, New York, the sum of $44.36 costs as taxed.

ORDERED, that this Order and Judgment be and the same are hereby stayed to and including July 8, 1968, in order to permit the defendant, if he so chooses to appeal therefrom and to apply for a further stay to the Supreme Court or a Justice thereof.

Dated: June 18, 1968.

IRVING R. KAUFMAN,
Circuit Judge.

JOSEPH C. ZAVATT,
Chief Judge.

GEORGE ROSLING,
District Judge.

Notice of Appeal to the Supreme Court of the United States.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

66-C-375

SANFORD ZWICKLER,

Plaintiff,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Defendant.

Notice is hereby given that Aaron E. Koota, the defendant above named, hereby appeals to the Supreme Court of the United States from the final order, judgment and decree denying the defendant's motion to dismiss the amended complaint, ordering, adjudging and decreeing Section 457 of the Election Law of the State of New York unconstitutional, enjoining defendant from arresting or prosecuting plaintiff under said statute, denying defendant's application to file a supplemental affidavit and annexed exhibit, and awarding costs to plaintiff in the sum of $44.36, entered in this action on June 18, 1968.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

Dated: New York, N. Y., June 26, 1968.

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Attorney for Defendant,
Office & P. O. Address,
80 Centre Street,
New York, N. Y., 10013.

To:
EMANUEL REDFIELD, Esq.,
37 Wall Street,
New York, N. Y.

Order, dated July 8, 1968.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1968

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellant,

v.

SANFORD ZWICKLER,

Appellee.

ORDER

UPON CONSIDERATION of the application of counsel for the appellant, and of the opposition of counsel for the appellee thereto,

IT IS ORDERED that the judgment of the United States District Court for the Eastern District of New York, of June 18, 1968, be, and the same is hereby, stayed providing the appellant perfects and dockets his appeal in this Court on or before August 5, 1968. Should such appeal be so perfected and docketed by that date, this stay is to remain in effect pending the issuance of the judgment of this Court.

/S/ JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States.

Dated this 8th day of July, 1968.

Memorandum of Mr. Justice Harlan.

SUPREME COURT OF THE UNITED STATES

Washington, D. C. 20543

Re: *Koota* v. *Zwickler*.

In my opinion the appellant is entitled to the requested stay of the District Court's judgment, conditioned however upon the appellant perfecting and docketing his appeal by not later than August 5, 1968. The issue involved is substantial and important, and the judgment below in practical effect has state-wide ramifications. Particularly in the absence of any showing by the appellee that he intends to distribute anonymous handbills, appellant, it seems to me, has the better of it with respect to the equities and the issue of irreparable damage. The accelerated docketing of the appeal will ensure that the jurisdictional statement will be ripe for consideration by the Court at its first conference of the October 1968 Term.

A stay of the District Court's judgment will issue, conditioned as aforesaid.

July 8, 1968.

**Order Noting Probable Jurisdiction—
October 14, 1968.**

SUPREME COURT OF THE UNITED STATES

No. 370, October Term, 1968

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellant,

v.

SANFORD ZWICKLER,

Appellee.

In this case probable jurisdiction is noted and the case is placed on the summary calendar.